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In Search of a Standard: Resolving the Relocation Problem in New York

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NOTE

IN SEARCH OF A STANDARD: RESOLVING THE RELOCATION PROBLEM IN NEW YORK

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I. INTRODUCTION

"Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way."¹ There is a different family, a custodial family, consisting of the marital children and whichever parent the courts (or the couple) thought would be more suitable for the role of custodial parent.² This Note deals with the legal problems that arise when one parent wishes to relocate to a new geographical area with the child. The parent may want to accompany a new spouse to her new residence, seek out employment opportunities, or simply sever all ties to the marital home and begin again in a different area. Regardless of the reason, however, the conflict is the same: the noncustodial parent faces an impairment of her visitation rights because the custodial parent seeks to relocate (or has already relocated) their children to an area farther away from the noncustodial parent. Problems arise when courts try to channel the direction of the new post-divorce family so that it mimics the pre-divorce family.

In theory, there are three approaches to resolving a relocation problem: the court will either favor the custodian, favor the noncustodian, or advocate a “neutral” approach whereby, in theory, neither parent is favored. A state will adhere to one of these general approaches by means of either a presumption or through an allocation of the burden of proof. The laws of some states contain outright presumptions that clearly favor either the custodial or the noncustodial parent. Other states create presumptions through the interpretation of laws and precedents. Similarly, the burden of proof can be directly or indirectly allocated to favor either


The children, after the parents’ divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children.

Id. at 29-30.
the custodial or noncustodial parent. The result can be either a light burden on the favored parent (indirectly placing the real burden of proof on the adverse party), or a burden that directly falls on the unfavored parent.

The "neutral" approach to resolving relocation problems, in theory, requires a court only to consider the welfare of the child involved. As a matter of policy, all courts hearing custody disputes look to the child's best interests, and some even make claims of neutrality. However, the child's interests do not exist in a vacuum, but rather, are naturally interwoven with the interests of both parents. Thus, in actuality, one parent will be favored under the guise of the best interests of the child.

It is this elusive neutral category that seems to be the goal of New York relocation law. In March 1996, New York's highest court changed New York's relocation standard from one that was perceived to be one of the most restrictive relocation standards, to a more permissive approach. Prior to the 1996 Tropea v. Tropea decision, New York courts analyzed relocation problems under a three-tier test. First, a noncustodial parent had to show that the move would affect her access to the child. If such a showing was made, the custodial parent had to demonstrate both that exceptional circumstances justified infringing upon visitation, and farther, that the move was in the best interests of the child.

In Tropea, the court adopted the "best interests of the child" standard in an attempt to fix the problems that existed under the three-tier approach. As discussed below, these problems included (1) lack of judicial insight as to how this standard would be interpreted, (2) an increase in the number of cases litigated, and (3) an improper allocation of the burden of proof on the custodial parent wishing to relocate.

However, the best interests of the child standard not only failed to fix these existing problems, but generated new ones as well. The best interests of the child standard, as applied to relocation law, has and will continue to fail in remedying the complexity of relocation problems.

3. See Carol S. Bruch & Janet M. Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 FAM. L.Q. 245, 293 (1996) (noting that Maryland courts have classified the new relocation statute as neutral, even though, in truth, it favors the noncustodial parent).
6. See infra notes 171-86 and accompanying text.
7. See infra Part IV.
This Note will argue that when faced with a relocation problem, instead of the best interests of the child standard, the court should presume that the custodial parent has a right to relocate upon showing a good faith reason for the move. The noncustodial parent could rebut this presumption by demonstrating that the move would harm the child.\textsuperscript{8} This presumption reflects a policy that protects the new post-divorce family. Moreover, it recognizes that the custodial parent should not be forced to relitigate the issue of custody that was originally awarded under the best interests analysis.

Part II of this Note surveys the various state approaches to relocation law. Part III analyzes the development and application of the three-tier test in pre-Tropea case law and concludes with a discussion of the New York court's Tropea decision. Part IV focuses on the problems which existed under the three-tier standard and, further, how the decision in Tropea has not only failed to resolve these problems but also creates additional ones. The Note concludes that the best solution to relocation problems is a presumption that the custodial parent has the right to relocate with her children.

\section*{II. APPROACHES TO RELOCATION LAW}

There are currently three general approaches to relocation law.\textsuperscript{9} A court will either favor the custodial parent, the noncustodial parent, or advocate a neutral approach whereby the court considers only the best interests of the child. While the courts of virtually every state claim to focus upon the interests of the child, in practice, the application of their statutes and case law clearly demonstrate that each state's approach really favors one parent over the other.\textsuperscript{10}

\begin{itemize}
\item \textsuperscript{8} Because a move will almost always affect the noncustodial parent's visitation schedule, and because the maintenance of a meaningful parent-child relationship can be accomplished through alternate visitation schedules, a showing of harm would require more than a mere effect upon the noncustodial parent's access to the child.
\item \textsuperscript{9} See James Grayson, \textit{International Relocation, the Right to Travel, and the Hague Convention: Additional Requirements for Custodial Parents}, 28 \textit{FAM. L.Q.} 531, 532 (1994). The American Law Institute divided the jurisdictions into "states [which] place a heavy burden on the relocating party to establish the benefits of the move to the child . . . [and] states [which] apply a strong presumption in favor of relocation." Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.20, Reporter's Notes, cmt. d (Preliminary Draft No. 6, 1996); \textit{see also} Bowermaster, supra note 4, at 803 (stating that the real decision in relocation is a policy determination of whether to favor the custodial parent or the noncustodial parent).
\item \textsuperscript{10} See Bowermaster, supra note 4, at 799 (stating that the ability of the best interests of the child standard to resolve relocation disputes is merely an illusion).
\end{itemize}
RELOCATION PROBLEM IN NEW YORK

New York, once fitting into the extremely restrictive category, now purports to look only to the child's interests. However, prior to an examination of whether New York's attempt to reach this third category by changing its standard is actually biased towards one parent, it is necessary to examine the various other approaches to relocation disputes.

A. Jurisdictions Favoring the Custodial Parent

There are two primary ways in which the courts and legislatures have favored a custodial parent in relocation disputes. The first has been an outward bias in the form of a presumption, and the second has been a favorable allocation of the burden of proof.

1. Presumptions Favoring Relocation

Jurisdictions which favor the custodial parent through an explicit presumption allowing relocation provide the custodial parent with the greatest security in being able to move and still retain custody of her children. For example, a custodial parent in Wisconsin who decides to relocate with her children is backed by a statutory presumption in favor of that parent's right to move. The Wisconsin Court of Appeals showed the strength of this presumption in *Kerkvliet v. Kerkvliet*. There, even though the custodial mother's motive for moving with the children was deemed "feeble and insensitive," she was allowed to take the children to Florida against the wishes of the noncustodial parent.

The Wisconsin court viewed the relocation issue as not whether to allow the move, but rather whether to transfer custody to the noncustodial parent in the event that the move actually took place. In *Kerkvliet*, the court stated that it did not have the power to leave custody with the custodial parent and then deny that parent's ability to move. Therefore, under the current statutory structure in Wisconsin, the custodial parent's ability to move and retain custody of their child is favored because the

11. The Wisconsin statute provides:
There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. This presumption may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child.


13. See id. at 829.

14. See id. at 826.

15. See id.
noncustodial parent can resist the custodial parent’s move only by petitioning for a transfer of custody.

A statutory presumption like that in Wisconsin generally dictates the outcome of relocation disputes by making it very difficult for the noncustodial parent to resist the move. The noncustodial parent, forced to petition for a change in custody, faces a “heavy burden” in overcoming the presumption and in showing that the custody transfer is in the best interests of the child. The Kerkvliet court took the protection of the custodial parent even further by emphasizing their ability to interpret the meaning of “best interests of the child” and to incorporate “numerous other considerations that are commonly associated with best interest of the child.”

South Dakota also supports a statutory presumption securing the custodial parent’s ability to move and retain custody of her children. In Fortin v. Fortin, the South Dakota Supreme Court faced a relocation request which, if enforced, would have dramatically altered the visitation schedule of the noncustodial parent. The court held that the potential changes in visitation should only be considered in the light of how these changes would affect the new custodial family. The custodial mother wished to relocate with her children to join her future husband. The court allowed the move, finding that the mother was motivated by her desire to be with her new husband rather than a desire to interfere with visitation.

16. See id. at 830.
17. Id. at 828. The court, in declining to limit the investigation of the best interests to the motive and the effect of the move, stated that such a limitation would prevent consideration of the quality of the child’s relationship with the moving parent and the noncustodial parent’s ability to accept the responsibility of primary physical custody if custody is transferred. See id.
18. The South Dakota statute reads as follows: “A parent entitled to the custody of a child has the right to change his residence, subject to the power of the circuit court to restrain a removal which would prejudice the rights or welfare of the child.” S.D. CODIFIED LAWS § 25-5-13 (Michie 1984).
21. See id. at 231.
22. See id. at 233-34 (Miller, C.J., dissenting). Chief Justice Miller noted that the majority decision ignored the precedential allocation of the burden of proof to the custodial parent to show that the move was in the child’s best interests, and instead, sought only to protect the newly created post-dissolution family. See id. (“Clearly, under [the] settled law, the burden is on the custodial parent . . . to show that a proposed move is ‘consistent with the best interests of the child.’” (emphasis omitted) (quoting In re Ehlen, 303 N.W.2d 808, 810 (S.D. 1981))).

In In re Ehlen, 303 N.W.2d 808 (S.D. 1981), the South Dakota Supreme Court, in allowing a custodial parent to move, adhered to “[t]he majority of cases dealing with removal” and stated that “if a parent who has custody of a child has good reason for living in another state, removal will be
Similar to Wisconsin, the South Dakota statutory presumption in favor of the custodial parent and the willingness of the court to ignore burdens of proof allocated to the custodial parent leave the noncustodial parent with only one way to resist the move—petition for custody. However, in *Fossum v. Fossum*, the South Dakota presumption again held strong when faced with a request to change custody. There, the court held that the removal of a child did not constitute the required “substantial change in circumstances” necessary to deny the move and warrant a transfer of custody.

Pro-removal jurisdictions often protect the custodial family by focusing on the continuing stability of the custodial parent’s relationship with the child. Recently, in *In re Marriage of Francis*, the Colorado Supreme Court held that

the child’s best interests are served by preserving the custodial relationship, by avoiding relitigation of custody decisions, and by recognizing the close link between the best interests of the custodial parent and the best interests of the child. In a removal dispute, this leads logically to a presumption that the custodial parent’s choice to move with the children should generally be allowed.

The Colorado presumption arises upon a showing that a sensible reason for the move exists. The court emphasized stability in the child’s relationship with the custodial parent and, consequently, protected the custodial parent by making it more difficult to challenge a relocation. The court reasoned that the practical effect of a custody change in a relocation dispute was a change in residence whether it involved a sole custody or a joint custody award. Therefore, the court determined that the standard for relocation cases, where there is any risk of changing the permitted, providing such a move is consistent with the best interests of the child.” *Id.* at 810. Therefore, while the burden of proof was technically allocated to the custodial parent, as Chief Justice Miller noted in his dissent, the majority was willing to find the burden met upon a showing that a “good reason” to move existed.

24. *Id.* at 832-33. The court noted that certain changes, e.g., a change in home, a change in school, or a reduction in contact with family and friends in the area, are all natural consequences of any move. In addition, the court noted that since the distance of the relocation was small, the impact of these changes would be minimized. See *id.*
26. *Id.* at 784.
27. *See id.*
28. *See id.*
29. *See id.* at 783.
residential custody of the child, should be the more stringent endanger-
ment standard, which allows a custody modification only if the move
would somehow harm the child.\textsuperscript{30}

Even in the absence of explicit statutory presumptions, some courts
interpret their state’s relocation statutes in ways that result in presum-
tions favoring the custodial parent’s right to move. For example, in \textit{Auge v. Auge},\textsuperscript{31} the Supreme Court of Minnesota adopted a pro-custodial
parent presumption despite a statute which seemingly favors the
noncustodial parent. The Minnesota statute provides:

The custodial parent shall not move the residence of the child to
another state except upon order of the court or with the consent of the
noncustodial parent, when the noncustodial parent has been given
visitation rights by the decree. If the purpose of the move is to interfere
with visitation rights given to the noncustodial parent by the decree, the
court shall not permit the child’s residence to be moved to another
state.\textsuperscript{32}

The court stated in \textit{Auge} that absent a showing of specific harm to
the child, a petition for removal would not trigger a de novo review of
the already determined issue of custody.\textsuperscript{33} Thus, although the Minnesota
statute is worded to favor the noncustodial parent, the court’s interpreta-
tion favors the custodial parent by requiring the noncustodial parent to
meet the difficult burden of showing that the \textit{purpose} of the move is to
interfere with visitation. By avoiding the relitigation of custody, the court
presumes that the custodial parent has a right to relocate and retain
custody.

While the Minnesota presumption, regarded as one of the most
protective of the custodial parent’s relationship,\textsuperscript{34} it is vulnerable to a
showing by the noncustodial parent that the move is contrary to the

\begin{footnotes}
\item[30] See id. The Colorado court set forth various ways in which the noncustodial parent could
rebut the presumption and overcome the heavy burden of showing that the move would not be in
the best interests of the child. See id. at 784-85. The noncustodial parent could show that the child
was integrated into her family; that the custodial parent consented to a modification of custody; that
the negative impact of the move “cumulatively outweighs the advantages” of remaining with the
custodial parent; or that the move would endanger the child. Id. at 785.
\item[31] 334 N.W.2d 393 (Minn. 1983).
\item[32] MINN. STAT. ANN. § 518.175(3) (West 1990).
\item[33] See \textit{Auge}, 334 N.W.2d at 399. The court noted that by the time a relocation case reaches
the courthouse, custody was already determined. See id.
\item[34] See Bowermaster, supra note 4, at 828; Mandy S. Cohen, Note, \textit{A Toss of the Dice . . . The
\end{footnotes}
child’s best interests.\textsuperscript{35} To meet this burden, courts require more than an impairment on the noncustodial parent’s visitation\textsuperscript{36} or the child’s preference to remain in the general location where he or she currently resides.\textsuperscript{37} In Auge, while not excluding other grounds to deny relocation, the court noted only one means by which a noncustodial parent could meet this burden: the noncustodial parent could show that the purpose of the move is to frustrate the noncustodial parent’s visitation rights.\textsuperscript{38}

The Supreme Court of California recently joined the ranks of presumption jurisdictions when it decided \textit{In re Marriage of Burgess}.\textsuperscript{39} The court held that the trial court must take into account the presumption that the custodial parent has a right to move with her child, provided that the move “would not be prejudicial to [the child’s] rights or welfare.”\textsuperscript{40} The \textit{Burgess} court provided the custodial parent with greater security in

\textsuperscript{35} See Auge, 334 N.W.2d at 397. Courts have previously denied moves where the noncustodial father presented evidence that the stability and security of the custodial mother’s new marriage was questionable; that no social service agency evaluated the child’s perspective new home; that the noncustodial father’s visitation would be affected; and that the children’s relationship with both extended families would suffer. See Sydnes v. Sydnes, 388 N.W.2d 3, 6 (Minn. Ct. App. 1986) (denying a mother’s petition to move to France where the noncustodial father presented evidence that the children had adjusted to their home, school, and community, and that the stability and continuity of remaining in Minnesota was in the children’s best interests); Benson v. Benson, 346 N.W.2d 196, 198-99 (Minn. Ct. App. 1984).


\textsuperscript{37} See Knott v. Knott, 418 N.W.2d 505, 507 (Minn. Ct. App. 1988); Madgett v. Madgett, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985) (noting that the preference of the child is not dispositive, but may be considered as one factor).

\textsuperscript{38} See Auge, 334 N.W.2d at 397. In both Benson, 346 N.W.2d at 199, and Sydnes, 388 N.W.2d at 6, the visitation rights of the noncustodial parent were a determining factor in the court’s denial of the custodial parent’s petition to remove the children.

In addition to denying relocation because it purposely frustrates the noncustodial parent’s visitation rights, the court has the authority to modify custody or deny a move, upon a showing of detriment to the child. See MINN. STAT. ANN. § 518.18(d) (West Supp. 1997).

\textsuperscript{39} 913 P.2d 473 (Cal. 1996). Prior to \textit{Burgess}, California courts required a custodial parent seeking to remove a child to show that the move was in the child’s best interests. See \textit{In re Marriage of Hoover}, 46 Cal. Rptr. 2d 737, 740 (Ct. App. 1995). In \textit{In re Marriage of Carlson}, 280 Cal. Rptr. 840 (Ct. App. 1991), the California Court of Appeal stated that the “precise test is whether any rational trier of fact could conclude that the trial court order advanced the best interests of the child.” \textit{Id.} at 845. Accordingly, California courts often deferred to the trial court’s determination of best interests. See \textit{Hoover}, 46 Cal. Rptr. 2d at 738; \textit{In re Marriage of Roe}, 23 Cal. Rptr. 2d 295, 298 (Ct. App. 1993).

\textsuperscript{40} \textit{Burgess}, 913 P.2d at 478.
the original custody award by rejecting the trial court’s attempt to apply a three-tier standard and by removing burdens of proof allocated to the custodial parent.41 Moreover, the court eliminated the previous requirement that the custodial parent show that a move is “necessary” and relieved trial courts from having to “micromanage” family decisionmaking by second-guessing everyday decisions about career and family.”42 Like the Minnesota court, the California court looked to avoid the relitigation of custody by concluding that a custody arrangement, once reached, should not be reexamined in a relocation case. “Instead, [the court] should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child’s best interest.”43 While it is California’s public policy to foster “frequent and continuing contact with both parents after the parents have separated or dissolved their marriage,”44 the Burgess court noted that maintenance of meaningful contact between the noncustodial parent and the child was “not restricted to any particular formula for contact or visitation; nor is [the court] required to make a custody determination that preserves the predissolution status quo.”45

The Burgess court recognized the realistic desire of post-dissolution families to redirect their growth. “[I]t is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so.”46

41. The court of appeal applied the following test: First, the noncustodial parent must show that the move will have an adverse impact on the existing pattern of care and adversely affect the nature and quality of the noncustodial parent’s contact with the child. If there is an impact, the custodial parent must show that the move is “reasonably necessary.” Finally, the third tier requires the court to balance the benefit to the child in moving against the loss of contact with the noncustodial parent. See In re Marriage of Burgess, 39 Cal. Rptr. 2d 213, 227-28 (Ct. App. 1995).

42. Burgess, 913 P.2d at 481. The court of appeal read into the California Family Code § 3020, an implicit requirement that the custodial parent show that the move is necessary. See Burgess, 39 Cal. Rptr. 2d at 228. The Family Code reads as follows: The Legislature finds and declares that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011. CAL. FAM. CODE § 3020 (West 1994).

43. Burgess, 913 P.2d at 482 (quoting Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986) (in bank)).

44. Id. at 479 (quoting CAL. FAM. CODE § 3020).

45. Id. at 481.

46. Id. at 480-81.
Presumptions generally provide the custodial parent with the greatest amount of security in being permitted to relocate and still retain custody. Moreover, presumptions promote stability in the relationship between the custodial parent and the child by making it more difficult for the noncustodial parent to challenge a removal petition. In addition, presumptions enhance custodial family stability by moving certain decisions, such as where the new custodial family is to reside, outside the court's authority. The decision to relocate should not trigger a reexamination of the already determined issue of custody. Absent a showing that a move would harm a child, courts should presume that the custodial parent has a right to relocate.

2. Burdens of Proof Favoring Relocation

By allocating the burden of proof, a court or legislature can favor the custodial parent in one of two ways. First, a light burden can fall on the custodial parent causing a shift in the burden of proof. This shift indirectly places the heavier burden on the noncustodial parent. Second, the burden can directly fall upon the noncustodial parent challenging the move.

Indirect placement of the burden on the noncustodial parent will sometimes require clarification by the court as the burden is often worded as though it falls on the custodian. For example, a custodial parent seeking permission to relocate in Florida faces a six-part test and a statutory statement of public policy favoring "frequent and continuing contact with both parents" after dissolution or separation. The six part test—which includes examining the likelihood of improving the quality of life, the motives behind the move, the likelihood of complying with substitute visitation, the adequacy of substitute visitation, the affordability of the transportation of the child, and the catch all "best interests of the child"—would seem to work against a custodial parent by placing numerous obstacles in the way of relocation. However, in a concurring opinion, Chief Judge Schwartz specifically enunciated the District Court of Appeal's policy of favoring the custodial parent's right to relocate and stated that so long as the parent who has been granted the primary custody of the child desires to move for a well-intentioned reason and founded belief

49. Hill, 548 So. 2d at 706.
that the relocation is best for that parent’s—and, it follows, the child’s—well-being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved.\(^{50}\)

Subsequent cases have attempted to reconcile this pro-custodial policy with the \textit{Hill} test and the statutory statement of policy. The Florida Supreme Court, in \textit{Mize v. Mize},\(^{51}\) attempted to clarify this issue by applying the six part test in addition to citing the \textit{Hill} concurrence. Further clarification was recently provided in \textit{Russenberger v. Russenberger},\(^{52}\) where the court held that although it did not interpret \textit{Mize} as a “per se rule” in favor of the custodial parent, courts should allow relocation where there is a good faith motive behind the move, and as per the \textit{Hill} factors, the child’s best interests will be served in the new location at least as well as in the current location.\(^{53}\)

Similar to Florida, the New Jersey relocation policy required clarification in the light of a statute which states that “[children] shall not be removed out of [their] jurisdiction against their own consent, if of suitable age . . . nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order.”\(^{54}\) In \textit{D’Onofrio v. D’Onofrio},\(^{55}\) the court clarified the meaning of “cause” by creating the “real advantage” test.

Under this test, the custodial parent had to show a “real advantage to herself and the children” as a result of the move.\(^{56}\) Since \textit{D’Onofrio}, the “real advantage” test has been modified to further protect the custodial parent’s right to seek out a better life.\(^{57}\) In \textit{Cooper v. Coo-
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the court relaxed the "real advantage" burden to require only a "good-faith reason for the move." This threshold was further relaxed in *Holder v. Polanski*, where the court held that "any sincere good-faith reason" would be sufficient provided the move was not "inimical to the best interests of the children or [did not] adversely affect the visitation rights of the noncustodial parent." Therefore, under New Jersey law, a custodial parent can now meet their burden of proving "cause" by showing any valid motive for relocation.

An indirect allocation of the burden of proof is often accomplished by first requiring the custodial parent to show that there is a good faith motive behind the move. Meeting this threshold requirement switches the burden of proof onto the noncustodial parent to show that the move is not in the child's best interests. For example, the Florida court allocates the burden of its six part test first to the custodial parent to show a good faith motive. The burden then switches to the noncustodial parent to show that the move is against the child's best interests as per the *Hill* factors.

Similarly, Nevada courts allocate a light burden of proof to the custodial parent in order to switch the true weight of the burden to the noncustodial parent. For example, in *Trent v. Trent*, the Supreme Court of Nevada required the custodial parent to show "a sensible, good faith reason for the move." Upon meeting this threshold burden, the court then weighed additional factors including the chance of improving the child's and parent's quality of life, the motives behind the move, compliance with a revised visitation schedule, the noncustodial parent's motives in opposing the move, and the chance that visitation rights could be realized.

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59. *Id.* at 613. The *Cooper* court justified the allocation of the burden of proof based upon the noncustodial parent's ability to demonstrate that the alternative visitation schedule would not be possible. *See id.* at 614.
60. 544 A.2d 852 (N.J. 1988).
61. *Id.* at 856 (emphasis added). The *Holder* court, while specifically stating that the noncustodial parent's right to visitation should be considered, noted that it may be possible to allow the move and still honor the visitation schedule. Either way, the concern should be the best interests of the child. *See id.*
64. *Id.* at 1313 (citing *Jones v. Jones*, 885 P.2d 563 (Nev. 1994)).
The noncustodial parent is then left to establish that an alternative schedule is not in the best interests of the child. In recent years, Nevada courts have accepted large blocks of summer and vacation time as acceptable alternatives to the usual weekly visitation schedule. In this way, the courts are able to balance the child’s and the noncustodial parent’s interests while still protecting the custodial parent’s right to continue with her life.

New Jersey’s “real advantage” test, a cornerstone of relocation law, also places the true weight of the burden of proof on the noncustodial parent. Once the custodial parent meets the threshold of showing “any good faith reason,” the noncustodial parent then must show that the move is not in the child’s best interests or that the move would adversely affect the noncustodial parent’s visitation rights. However, even in the event that the move would affect visitation, the Holder court stated that “if the custodial parent is acting in good faith and not to frustrate the noncustodial parent’s visitation rights, that should suffice.”

Similar to presumption jurisdictions, such as Minnesota and California, as well as burden of proof jurisdictions such as Nevada, the Holder court noted that simply affecting the visitation would be insufficient to challenge relocation because visitation may be mitigated under an alternative visitation schedule. Finally, the court concluded that the noncustodial parent must show that the move would somehow harm the child rather than requiring the custodial parent to show that the move would be a benefit.

Gandee, 895 P.2d 1285, 1291 (Nev. 1995) (reversing the denial of a custodial mother’s petition to relocate with her children where the lower court failed to consider alternative visitation schedules).

In addition to the initial light burden on the custodial parent, the Nevada court also uses the additional factors to protect the custodial parent-child relationship. The court considers the additional secondary factors by focusing on the feasibility of a reasonable, alternative visitation schedule (a relatively easy task for the custodial parent wishing to move). See Cook, 898 P.2d at 706; see also Gandee, 895 P.2d at 1285.

67. See Jones, 885 P.2d at 570-71 (holidays, one month split throughout the summer, and three-day weekends); Schwarz, 812 P.2d at 1272 (one summer month).
69. Id. at 857.
70. See supra notes 31-46 and accompanying text.
71. See supra notes 63-67 and accompanying text.
72. See Holder, 544 A.2d at 857 ("[T]he mobile society, it may be possible to honor that schedule and still recognize the right of a custodial parent to move."); see also Winer v. Winer, 575 A.2d 518, 524, 528 (N.J. Super. Ct. App. Div. 1990) (remanding the case to determine if an alternate visitation schedule would be sufficient to mitigate the loss of the present visitation schedule).
73. See Holder, 544 A.2d at 857.
Some jurisdictions will indirectly favor the custodial parent by taking into consideration not only the child's interests but also the interests of the custodial parent. For example, the New Jersey Supreme Court in *Holder* noted that the custodial parent "should enjoy the same freedom of movement as the noncustodial parent."74 Likewise, in *Rampolla v. Rampolla*,75 the court recognized that when two parents agree on location, it is often an agreement to remain in close proximity, not necessarily to remain in close proximity within a particular jurisdiction.76 The *Rampolla* court suggested weighing not only the possibility of the custodial parent remaining where they currently reside, but also the possibility of the noncustodial parent moving to the custodial parent's new jurisdiction, thereby indirectly adding once again to the noncustodial parent's burden of proof.77 This approach was a major step toward for the current trend to award custody to a parent, not a jurisdiction.

The court recognized that the noncustodial parent's relationship with the child can exist in a new location just as it existed in the former one. The New Jersey court's approach, equating the ability of the noncustodial parent to move with the possibility of the custodial parent remaining in the current jurisdiction, is analogous to the Florida court's requirement that the custodial parent show that the child's quality of life in the new location will be at least as good as it is in the current jurisdiction.78 Both analyses recognize that the child's best interests are not dependent upon location, but rather upon the child's relationship with the custodial parent.

Courts in other jurisdictions, following New Jersey's "real advantage" test, have recognized that the child's interests are interwoven with, and possibly dependent upon, the interests of the custodial parent.79 One

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74. *Id.* at 856.
76. *See id.* at 544.
77. *See id.* at 543-44.
commentator has referred to this dependency as the “trickle down” approach to relocation law, whereby the best interests of the child are protected by considering the interests of the custodial parent.\textsuperscript{80} For example, the Superior Court of Pennsylvania, in \textit{Gruber v. Gruber},\textsuperscript{81} established a test similar to New Jersey’s “real advantage” test\textsuperscript{82} and stated that “the best interests of the child are more closely allied with the interests and quality of life of the custodial parent and cannot, therefore, be determined without reference to those interests.”\textsuperscript{83}

In jurisdictions where the burden falls directly on the noncustodial parent, courts and legislatures are generally willing to take a more aggressive stance in protecting the custodial parent’s right to relocate. For example, the Indiana Court of Appeals, in \textit{Swonder v. Swonder},\textsuperscript{84} interpreted the state’s relocation statute\textsuperscript{85} to reflect the “custodial parent’s right to continued custody.”\textsuperscript{86} There, the noncustodial father petitioned the court for a transfer of custody in the event that the custodial mother moved their children to Colorado.\textsuperscript{87}

\begin{footnotes}


\item[82] The court set forth the following steps in its relocation analysis: [A]ssess the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent. Next, the court must establish the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it. Finally, the court must consider the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent. \textit{Id.} at 439.

\item[83] \textit{Id.} at 438.

\item[84] 642 N.E.2d 1376 (Ind. Ct. App. 1994).


\item[86] \textit{Swonder}, 642 N.E.2d at 1380 (emphasis added).

\item[87] \textit{See id.} at 1376-77. Under Indiana statutory law, upon request of either party involved in a relocation dispute, the court will examine and, if necessary, modify the custody, visitation, or support orders. \textit{See IND. CODE ANN.} § 31-1-11.5-21. Such a heavy burden is similar to a presumption, used in states such as Wisconsin, where the noncustodial parent can only resist a move by showing that it is against the child’s best interests. Such resistance must be in the form of a petition to transfer custody. \textit{See supra} notes 11-17 and accompanying text.

\end{footnotes}
According to the Indiana Code, a noncustodial parent challenging a relocation by petitioning to modify custody must show that the modification would be in the child’s best interests and that there is a change in circumstances “so substantial and continuing as to make the existing custody order unreasonable.” Moreover, the change must be a “change of conditions in the custodial home or a change in the treatment of the children in the custodial home . . . of a decisive, substantial, and continuing nature.” The Swonder court protected the custodial parent by holding that an out of state move is not so substantial and continuing to justify a denial of the move. In further support of the custodial parent, the court stated that relocation is just another change that “occur[s] as life goes on” and is not a reason to relitigate custody.

Similar to the Indiana court’s protection of the custodial parent by making it very difficult for the noncustodial parent to contest the move, North Dakota courts favor the custodial parent by requiring first that there is a substantial change in circumstances, and second, that the requested custody modification be in the child’s best interests. Moreover, the North Dakota court, in Barstad v. Barstad, stated that “[t]he maintenance of custodial stability and continuity ‘is a very compelling consideration’” in determining custody and merits the protection of the existing custodial relationship. In denying the noncustodial father’s petition to transfer custody, the court held that neither the trial court’s decision that the move would significantly affect visitation nor the child’s preference to live with his noncustodial father constituted a substantial change in circumstances per se.

Vermont courts also protect the custodial parent’s right to relocate by directly allocating the burden of proof to the noncustodial parent and making it difficult to challenge a relocation. Similar to the language of

88. See IND. CODE ANN. § 31-1-11.5-22(d) (West 1979) for the statutory language prior to the amended language detailed infra note 89 and accompanying text.
89. Id. The Indiana Code has been subsequently changed and presently applies to “a substantial change in one (1) or more of the factors which the court may consider . . . .” IND. CODE ANN. § 31-1-11.5-22(d) (West Supp. 1996).
90. Swonder, 642 N.E.2d at 1380 (citation omitted).
91. See id. at 1381.
92. Id. at 1383 (quoting Walker v. Chatfield, 553 N.E.2d 490, 492 (Ind. Ct. App. 1990)).
94. 499 N.W.2d 584 (N.D. 1993).
95. Id. at 587 (quoting Delzer v. Winn, 491 N.W.2d 741, 744 (N.D. 1992)).
96. See id. at 588; see also Klose v. Klose, 524 N.W.2d 94, 96-97 (N.D. 1994) (denying a petition to transfer custody even though both children expressed a desire to remain behind to live with the noncustodial parent).
the Indiana statute, the Vermont court, in *Lane v. Schenck*, required the noncustodial parent to show that the child's best interests "would be so undermined by a relocation . . . that a transfer of custody [would be] necessary." The Vermont statute requires a showing that there is a "real, substantial and unanticipated change of circumstances" in addition to showing that the move is in the child's best interests.

In *Lane*, the custodial mother appealed a family court decision that required her to choose between attending law school in Iowa and retaining custody of her children. The mother, believing custody to be of paramount importance, gave up her chance to attend law school rather than give up custody. The *Lane* court reversed and remanded the case because the lower court erroneously failed to determine whether the change in circumstances would make a change in custody necessary. The court noted that forcing a custodial parent to choose between a child and a chance for a new life was an improper means of coercing the parent into remaining within the jurisdiction.

At first glance, the allocation of the burden of proof in Tennessee seems to treat the custodial and noncustodial parent equally. Depending upon whether or not there is a relocation restriction in the original custody agreement, the Tennessee court will either directly or indirectly allocate the burden of proof. In the absence of a relocation restriction, the burden falls directly on the noncustodial parent. Where there is a restriction, the burden falls on the custodial parent to show that the move is in the child’s best interests. However, if the custodial parent makes "a prima facie showing of a sincere, good-faith reason for the move and a prima facie showing that the move is consistent with the child’s best interest" the burden will shift back to the noncustodial parent.

The Tennessee court's aggressive approach in protecting the custodial parent's right to relocate is evidenced not only by this burden

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97. See supra note 89 and accompanying text.
99. Id. at 792.
100. VT. STAT. ANN. tit. 15, § 668 (1989).
101. See Lane, 614 A.2d at 787.
102. See id. at 787-88.
103. See id. at 792.
104. See id.; see also Bruch & Bowermaster, supra note 3, at 276 (noting that courts often present a "Sophie’s choice" to custodial mothers, forcing them to choose between their new husband and custody of their children).
106. See id.
107. Id.
shifting, but also by the fact that Tennessee courts have recently abandoned the best interests of the child standard in favor of an outright presumption. Initially, the Tennessee court favored the custodial parent by applying the best interests of the child standard in order to preserve some element of family autonomy and ease the resolution of custody disputes. Recently, in *Aaby v. Strange*,\(^\text{108}\) while still favoring the custodial parent, the court rejected the “best interests of the child” test for relocation cases because such a vague standard made those goals “difficult or impossible to achieve.”\(^\text{109}\)

Allegorical to the trickle down approach of determining the best interests of the child,\(^\text{110}\) the court recognized that a standard that looked solely to the best interests of the child was inapplicable because the child’s interests are naturally interwoven with the interests of the parent.\(^\text{111}\) Under this newly adopted presumption, a Tennessee custodial parent is allowed to remove the child unless the noncustodial parent demonstrates, by a preponderance of the evidence, that the motive behind the move is to deter visitation.\(^\text{112}\) The court’s holding was consistent with other jurisdictions that directly allocate the burden of proof, such as Indiana, North Dakota and Vermont,\(^\text{113}\) in that the noncustodial parent can oppose the move by showing that the move is a material change in circumstances that would harm the child. However, the Tennessee court took this approach one step further by recognizing that an investigation into a material change in circumstances is separate from a removal proceeding.\(^\text{114}\)

Allocating the burden of proof to favor the custodial parent, though effective, creates problems that do not exist in jurisdictions that favor the custodial parent through a presumption. As evidenced by states such as Florida and New Jersey, indirect allocation of the burden of proof can create confusion and require the court to clarify their policy or to continuously define their tests.\(^\text{115}\) In addition, switching the burden from the custodial parent to the noncustodial parent masks what the courts are really attempting to accomplish—permitting the custodial parent to relocate. From a practical standpoint, a presumption in favor of the

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\(^{108}\) 924 S.W.2d 623 (Tenn. 1996).

\(^{109}\) Id. at 629.

\(^{110}\) See supra notes 80-83 and accompanying text.

\(^{111}\) See *Aaby*, 924 S.W.2d at 629.

\(^{112}\) See id.

\(^{113}\) See supra notes 84-104 and accompanying text.

\(^{114}\) See *Aaby*, 924 S.W.2d at 630.

\(^{115}\) See supra notes 47-61 and accompanying text.
custodial parent’s right to relocate would be a more direct way of accomplishing this goal.¹⁶

B. Jurisdictions Favoring the Noncustodial Parent

While the trend in relocation law is to favor the custodial parent, some states remain adamant in protecting the noncustodial parent’s right to continuing visitation. Like those states that favor the custodial parent, pro-noncustodial jurisdictions give effect to their policy by means of either a presumption or an allocation of the burden of proof that weighs heavily against the disfavored parent.

1. Presumptions Against Relocation

Jurisdictions that favor the noncustodial parent through an outright presumption are few in number. Those that do often direct their focus to collateral issues while avoiding a determination of whether the child could benefit from the move. For example, the South Carolina Supreme Court, in *McAlister v. Patterson,*¹¹⁷ focused on the child’s relationship with his extended family. There, the custodial mother wished to relocate to Washington D.C. with her son and her new husband.¹¹⁸ The court stated that “[a]s a rule, the presumption is against removal of the child.”¹¹⁹ The court placed significant emphasis on the trial court’s holding that removal of the child would be detrimental not only to the child’s relationship with his noncustodial father, but also with his grandparents, his great-grandparents, and even his great aunt.¹²⁰ The court placed greater significance on the child’s relationship with his extended family than it did on his relationship with his custodial parent.

Similarly, in Maine, courts wrongly place emphasis on maintaining the child’s environmental continuity rather than on the child’s need for custodial continuity. For example, the Supreme Judicial Court of Maine, in *Rowland v. Kingman,*¹²¹ stated that the child would benefit from “the continuity of locale, routine, community, and schooling.”¹²²

Prior to the dissolution of their marriage, the Rowland parents lived

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¹¹⁶. This argument also applies to jurisdictions that directly allocate the burden onto the noncustodial parent.
¹¹⁷. 299 S.E.2d 322 (S.C. 1982).
¹¹⁸. See id. at 322.
¹¹⁹. Id. at 323.
¹²⁰. See id.
¹²¹. 629 A.2d 613 (Me. 1993).
¹²². Id. at 616.
in Yarmouth, Maine. After the dissolution, the noncustodial father moved to Winslow while the custodial mother remained in Yarmouth. In addition to denying the custodial mother's relocation to Oregon, the court decided that if the custodial mother did move, the noncustodial parent could gain residential custody only if he moved back to Yarmouth. In essence, the court placed greater importance on the children remaining in Yarmouth and the continuity of location than it did on which parent would be the custodial parent. The dissent sharply criticized the court for placing "undue emphasis on the current residence of the children by requiring that their primary residence be in the Town of Yarmouth, a location where neither parent ha[d] a reason to reside . . . ."

Similar to jurisdictions that recognize a presumption in favor of the custodial parent, some anti-removal jurisdictions interpret custody statutes so as to create pro-noncustodial parent presumptions. In Rowland, the Supreme Judicial Court of Maine used a statute, which labeled relocation a "substantial change in circumstances," in order to force the custodial parent to choose between moving to Oregon to be with her new husband or remaining in Maine with her children. By raising relocation to the level of a "substantial change," the Maine court justified a transfer of custody upon the custodial parent's decision to relocate.

However, the Rowland decision left many questions unanswered. For instance, and most important, in the event that neither parent wished to remain in Yarmouth, would the court have allowed the move? Moreover, the Rowland decision neglected to consider the growth of the custodial family since the divorce. Although neither the custodial nor the noncustodial parent wished to live in Yarmouth, the parent wishing to gain or keep custody was forced to live there. The court failed to imagine the children receiving equal "routine, community, and schooling" in either Oregon or in the father's new home.

Commentators have questioned the ability of Rowland to guide future custody determinations. The focus on "environmental continu-

123. See id. at 614.
124. See id.
125. See id.
126. Id. at 617 (Clifford & Roberts, JJ., dissenting).
128. See Rowland, 629 A.2d at 615.
129. This question was never answered as the father expressed a willingness to move back to Yarmouth in the event that the children's mother relocated to Oregon. See id. at 616.
130. See Bruch & Bowermaster, supra note 3, at 289.
"continuity" seems out of place in a time where the trend in relocation law is to maintain "custodial continuity."\textsuperscript{131} In addition, focusing on stability in location fails to address either the custodial parent's desire to move or the noncustodial parent's visitation schedule. Like the South Carolina court, the Maine Court emphasized collateral matters and decided a relocation dispute by avoiding the real relocation dilemma.

In contrast, a presumption in favor of the move would focus on the motives behind the move. In addition, a presumption favoring the custodial parent would result in a more equitable treatment of both parties by recognizing the custodial parent's right to relocate and at the same time providing the noncustodial parent with the option to petition for a change in custody if the move would harm the child. In sum, a presumption favoring relocation would address the "real" issues and not divert attention to collateral ones.

2. Burdens of Proof Disfavoring Relocation

Similar to jurisdictions that favor the custodial parent, anti-removal jurisdictions allocate the burden of proof either directly or indirectly to favor the noncustodial parent. In jurisdictions that attempt to resolve relocation disputes by reexamining custody, courts will often require the challenging parent to show that there is a change in circumstances justifying a modification. Although this requirement seems to place the burden on the noncustodial parent, the burden is actually indirectly placed on the custodial parent as anti-removal courts are quick to conclude that the petition to relocate itself qualifies as a sufficient change in circumstances.

For example, the Maryland courts indirectly place the burden of proof on the custodial parent. Rather than follow the current trend (or its own precedent, for that matter) in favoring the relocating parent, the Maryland court, in Domingues v. Johnson,\textsuperscript{132} held that "it is not necessary that a parent be declared unfit" before custody can be changed.\textsuperscript{133} Moreover, the court eased the noncustodial parent's burden by stating that "changes brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody."\textsuperscript{134} The Maryland court, by declaring relocation a sufficient justification for changing custody, forces the custodial parent wishing to relocate into a

\textsuperscript{131} Id.
\textsuperscript{132} 593 A.2d 1133 (Md. 1991).
\textsuperscript{133} Id. at 1140.
\textsuperscript{134} Id.
full blown redetermination of custody.\textsuperscript{135}

Prior to \textit{Domingues}, the burden was on the noncustodial parent to show that the move would result in harm to the child.\textsuperscript{136} Now, however, the burden falls on the custodial parent to show that the move is in the child's best interests.\textsuperscript{137} In short, by allocating the burden of proof, Maryland favors the noncustodial parent.\textsuperscript{138}

Like Maryland, the Virginia Court of Appeals also helps the noncustodial parent meet their burden by deeming relocation to be a change in circumstances sufficient to reevaluate custody. In \textit{Hughes v. Gentry},\textsuperscript{139} the court initially stated that the burden was on the noncustodial parent challenging the move to show a change in circumstances since the last custody award.\textsuperscript{140} However, the court then went on to say that "the relocation of the custodial parent . . . constitutes a material change of circumstances"\textsuperscript{141} sufficient to justify a change in custody from the custodial mother to the noncustodial father.\textsuperscript{142} Therefore, the actual burden of proof fell on the custodial parent to show that the change of circumstances would be in the child's best interests.\textsuperscript{143}

The Illinois courts have provided relocation law with a good example of what not to do in determining a removal dispute. In accordance with Illinois statutory law,\textsuperscript{144} the Illinois Supreme Court determined state policy and procedure for relocation disputes in \textit{In re Marriage of Eckert}.\textsuperscript{145} However, since that decision, Illinois courts have failed to consistently interpret the Illinois Supreme Court's holding. The

\textsuperscript{135} Additionally, the true weight of the burden of proof falls on the custodial parent because, like the Maine court in \textit{Rowland}, Maryland courts place a heavy emphasis on environmental stability. See \textit{id.} at 1141 (stating that although continuity in the custodial parent relationship is important, stability can also be found in allowing the children to remain in their current location).


\textsuperscript{137} See \textit{Domingues}, 593 A.2d at 1139.

\textsuperscript{138} See Bowermaster, supra note 4, at 818. Although the Maryland court believes the best interests of the child approach to be neutral, the focus on environmental stability, the increase of the burden on the custodial parent, and the classification of relocation as a substantial change in circumstances justifying a change in custody all reveal that the Maryland approach truly favors the noncustodial parent. See \textit{id.}

\textsuperscript{139} 443 S.E.2d 448 (Va. Ct. App. 1994).

\textsuperscript{140} See \textit{id.} at 451.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} See \textit{id.} at 452.

\textsuperscript{143} See \textit{id.} at 452-53.

\textsuperscript{144} See 750 ILL. COMP. STAT. ANN. 5/609 (West 1993).

\textsuperscript{145} 518 N.E.2d 1041 (Ill. 1988). The court stated that "the burden of proving that such removal is in the best interests of such child . . . is on the party seeking the removal." \textit{Id.} at 1045 (quoting 750 ILL. COMP. STAT. ANN. 5/609).
result leaves Illinois parents with conflicting case law by which to predict judicial reaction to a proposed relocation—arguably leaving Illinois parents in a worse position then if there were no relocation standard at all.

In Eckert, the court adopted a pro-noncustodial parent position by seeking to prevent the lower courts from “dilut[ing] the burden of proof which the legislature has placed on the custodial parent.” The court held that while the primary consideration is always the best interests of the child, the court should be guided by the Illinois Marriage and Dissolution of Marriage Act which seeks to “secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation.” The noncustodial parent was found, by expert opinion, to have had a very involved and “excellent relationship” with his son. The court emphasized the noncustodial parent’s right to visitation, noting that a court should be “loathe to interfere” with a visitation schedule where the noncustodial parent “assiduously exercised his or her visitation rights.”

Although the Eckert opinion seems to clearly establish the court’s pro-noncustodial policy, the lower courts have interpreted the decision inconsistently. Within the same year, the Illinois Appellate Court decided In re Marriage of Zamarripa-Gesundheit, citing the Illinois removal statute, the holding in Eckert, and the three primary focuses of the Eckert court in determining removal cases. However, the court reached the opposite result of the Eckert court and allowed the custodial parent to remove the child.

In Zamarripa-Gesundheit, the custodial mother wished to relocate to Seattle to be with her new husband. The noncustodial father was

146. Id.
148. Eckert, 518 N.E.2d at 1046 (citing the Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/102 (West Supp. 1997)).
149. Id. at 1043.
152. The three factors for determining relocation are (1) the likelihood of improving the quality of life of both the parent and the child, (2) the motive of the custodial parent for moving and the motive of the noncustodial parent for challenging the move, and (3) the visitation rights of the noncustodial parent, including the opportunity to establish a realistic and reasonable visitation schedule. See id. at 782.
153. See id. at 780.
very involved in his daughter’s life, much like the noncustodial father in \textit{Eckert}. However, the court held that although the move would affect the father’s visitation,\textsuperscript{154} the interests of the custodial parent should not be subordinated to the interests of the noncustodial parent.\textsuperscript{155} Consistent with states following a trickle down philosophy of the best interests of the child,\textsuperscript{156} the court concluded that since the mother’s new husband wanted to live in Seattle, and the mother wanted to live with her new husband, the child would be happier if the removal were allowed because the new couple, and consequently, the family would be happier.\textsuperscript{157}

In contrast to the holding in \textit{Zamarrippa-Gesundheit}, the Appellate Court, in \textit{In re Marriage of Berk},\textsuperscript{158} denied a custodial mother’s request to remove the child to Canada. The custodial mother argued that the quality of her life and, therefore, her children’s lives would improve if she were allowed to move to be with her new husband.\textsuperscript{159} Although the potential for improving the child’s quality of life through improving the custodial parent’s happiness was a controlling reason for allowing the relocation in \textit{Zamarrippa-Gesundheit}, it was rejected by the \textit{Berk} court.\textsuperscript{160}

The \textit{Berk} court stated that if the happiness of the parent being able to join her new spouse was sufficient to show best interests, then there would be no need to adjudicate removal cases, and the court’s authority to decide relocation would become merely “ceremonial.”\textsuperscript{161} In short, the \textit{Berk} court gave previous removal cases little, if any, precedential value.\textsuperscript{162}

Once again it seemed as though the Illinois Appellate Court worked out its policy towards relocation when it decided \textit{In re Marriage of}
Eaton. There the court stated that the link between the custodial parent's best interests and the child's best interests was not always sufficient to warrant a granting of relocation. Consistent with Berk, the relationship between the parent's quality of life and the child's interests was only one factor to be considered.

Recently, however, the Illinois Appellate Court again changed its focus in deciding removal cases. In In re Parentage of R.M.F, the court allowed the custodial mother to remove her minor child to Arizona, heavily emphasizing that "there is a connection, albeit indirect, between the custodial parent's quality of life and the child's quality of life." The court extracted examples from a previous relocation case, demonstrating how the child's quality of life would improve through the custodial parent's improved quality of life. This approach, again, tipped the scale in favor of the move.

The confusion existing in the Illinois appellate courts presents what is potentially one of the worst situations for a couple seeking to resolve a relocation dispute. While a presumption or a burden of proof may present difficult challenges for the disfavored parent, there is still some security to be found in knowing how the court will address the situation. Litigating a removal within the Illinois courts, on the other hand, is akin to "rolling the dice."

Unfortunately, however, the inability of the Illinois Appellate Court to reach a consensus about how to approach relocation cases is not unique. When the three-tier relocation test was the standard in New York, the lower courts often disagreed on the interpretation and application of the various stages of the test. This confusion was not

164. See id. at 642 ("When a move would improve the quality of the custodial parent's life, we conclude the trial judge must consider the benefits to be realized by the child . . . from such enhancement of the custodial parent's circumstances.").
166. Id. at 1141.
167. See In re Marriage of Pfeiffer, 604 N.E.2d 1069 (Ill. App. Ct. 1992) (noting that a higher paying job, better schools, and better opportunities in general could all be used as evidence that the child's quality of life would improve in the new location).
168. The phrase appropriately sums up the frightening randomness by which various jurisdictions approach relocation law. See Cohen, supra note 34, at 131.
169. Some commentators consider the New York approach to be a two-level examination. See, e.g., Sondra Miller, Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?, 15 PACEL. REV. 339, 343-48 (1995). In this Note, the New York approach will be regarded as a three-tier test as case law clearly distinguishes between level one, implications on visitation, and level two, exceptional circumstances, in that it is possible to affect the noncustodial parent's visitation without evoking the second tier of the test.
alleviated by changing to the best interests of the child standard. The relocation laws in Illinois and New York evidence the confusion that results from ambiguous, amorphous, and vague relocation standards.

III. NEW YORK RELOCATION LAW

A. Pre-Tropea Case Law

Prior to the adoption of the amorphous "best interests of the child" standard, New York's three-tier test was regarded as one of the most anti-removal standards in relocation law. Under the first tier, the burden of proof was on the noncustodial parent to show that relocation would result in the denial of regular and meaningful access to the child. Meaningful access has been defined as the "ability of a noncustodial parent to continue to maintain a close and meaningful relationship with his or her children." Second, upon showing that the move impaired visitation, courts recognized a presumption that the move was not in the best interests of the child. A custodial parent could rebut the presumption by showing

170. See infra Part IV.

171. Although the test for relocation is stated in numerous cases, it is generally credited to two court of appeals cases, see Daghir v. Daghir, 439 N.E.2d 324 (N.Y. 1982); Weiss v. Weiss, 418 N.E.2d 377 (N.Y. 1981), as well as a second department appellate decision, see Strahl v. Strahl, 414 N.Y.S.2d 184 (App. Div. 1979), aff'd, 407 N.E.2d 479 (N.Y. 1980).

172. See Bowermaster, supra note 4, at 804; see also Bruch & Bowermaster, supra note 3, at 297 ("After more than a decade as the jurisdiction with the standard harshest to custodial parents, New York has moved to a stance significantly more supportive of the custodial parent . . . .").

Historically, courts were reluctant to allow a custodial parent to relocate with a child because the courts feared losing control over custody and visitation disputes. Passage of the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988 & Supp. 1997), and the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1994), has largely eliminated this concern by specifically reserving jurisdiction to the state which decided the original custody dispute. The result has been the elimination of forum shopping by custodial parents seeking more permissive relocation jurisdictions. Nevertheless, the number of litigated relocation disputes is increasing rather than decreasing. See Roger M. Baron, Refining Relocation Laws—The Next Step in Attacking the Problem of Parental Kidnapping, 25 TEX. L. REV. 119, 119 n.3 (1993) (stating that the passage of these two acts helped to eliminate state "havens" for noncustodial parents).


that exceptional circumstances\textsuperscript{175} justified an infringement on visitation rights.\textsuperscript{176} Deciding what constituted “exceptional circumstances” generated a wealth of case law but no clear definition. There were, however, some factors which, if present, seemed to make approval of the move a bit more likely. For example, courts often deemed “economic necessity” sufficient to justify the infringement on visitation rights.\textsuperscript{177} In addition, the courts found exceptional circumstances where the move was involuntary, such as when it was caused by a new spouse’s job transfer.\textsuperscript{178}

Economic necessity is not an easy factor to prove as the term has been narrowly tailored. Courts have distinguished economic necessity from mere economic benefit. To meet the requisite level of exceptional circumstances, the economic benefit must be truly necessary, as opposed to the relocating parent’s desire or mere opportunity for economic betterment.\textsuperscript{179} Where the custodial parent seeks to simply start fresh in

\begin{itemize}
  \item \textsuperscript{175} The “exceptional circumstances” requirement has also been stated as a requirement of “exceptional circumstances or pressing concerns.” Stec v. Levindofsk\textskew45e, 550 N.Y.S.2d 966, 967 (App. Div. 1990); Barie v. Faulkner, 497 N.Y.S.2d 565, 566 (App. Div. 1985).
  \item \textsuperscript{176} The exceptional circumstances language, which is often cited in relocation cases, was used in Weiss, 418 N.E.2d at 380, in a pre-removal context. The Weiss court stated:
    \begin{quote}
    \[\text{[I]n initially prescribing or approving custodial arrangements, absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course.}\]
    \end{quote}
    \textit{Id.} (citation omitted). The subsequent appellate court interpretation of this language transformed the Weiss language into the relocation test.
  \item \textsuperscript{177} See, e.g., Amato v. Amato, 609 N.Y.S.2d 51, 52-53 (App. Div. 1994) (holding that lower rent, additional child care, health insurance, and full-time employment were exceptional circumstances meriting a disturbance of the noncustodial parent’s right to visitation); Reyes v. Bell, 557 N.Y.S.2d 683 (App. Div. 1990) (finding exceptional circumstances where the custodial mother’s new husband had a tenured job and the father had proven delinquent with child support payments); Klein v. Klein, 460 N.Y.S.2d 607, 608 (App. Div. 1983) (finding exceptional circumstances where the custodial mother would live rent free and benefit from the willingness of both family and friends to ease the burden of day care expenses and assist in the care of the child); see also Shed v. Sofia, 521 N.Y.S.2d 1008, 1010 (App. Div. 1987), aff’d, 521 N.E.2d 440 (N.Y. 1988) (Fine & Balio, JJ., dissenting) (noting that the majority found exceptional circumstances where the custodial mother’s new husband could earn a large salary if the family moved).
  \item \textsuperscript{178} See Pecorello v. Snodgrass, 530 N.Y.S.2d 350, 350 (App. Div. 1988); \textit{see also} Church v. Church-Corbett, 625 N.Y.S.2d 367 (App. Div. 1995) (holding that where the custodial mother’s new husband, a Naval officer, was involuntarily assigned to Italy for a period of three years, there were exceptional circumstances to justify the move).
  \item \textsuperscript{179} See Ellor v. Ellor, 535 N.Y.S.2d 643, 645 (App. Div. 1988) (holding that there was not an argument for economic necessity where the custodial mother did not work or seek out employment in the new location); \textit{see also} Powers v. Powers, 608 N.Y.S.2d 342, 343 (App. Div. 1994) (noting that a limited financial benefit was insufficient to warrant a removal).
\end{itemize}
a new location, to “better” her economic condition, the request for relocation has been denied.  

Economic necessity arising out of the possibility of improving the custodial family’s income, such as where the custodial parent or a new spouse receives a promotion, has met some opposition in the appellate courts. Courts have denied relocation where the custodial parent failed to exhaust all local job opportunities and where the acceptance of a new job or promotion was optional.  

In addition to economic necessity, domestic violence and an adverse effect on the child’s psychological health have also been held sufficient to meet the requisite level of exceptional circumstances necessary to alter the current noncustodial parent’s visitation schedule. However, because courts are generally unwilling to subordinate the noncustodial parent’s visitation rights to the needs of a new spouse, remarriage, absent a showing of economic necessity, is generally insufficient to meet exceptional circumstances.  

The third and final tier of the New York standard was the catchall test of whether the move was in the best interests of the child. It is this “catch-all” tier that provided the noncustodial parent with the greatest protection against removal. Because of the vague nature of the best interests standard, the courts were free to interpret “best interests”  

186. Since Tropea was decided, it is this third tier that is all that remains of the three-tier test.
as they wished. Unfortunately for the custodial parent, this often meant keeping the custodial parent chained to the jurisdiction that initially governed the custody order.

Although New York law traditionally favored the noncustodial parent, several courts have attempted to chip away at the pro-noncustodial three-tier test. The Appellate Division, Third Department made one of the first attempts to abandon the three-tier standard. The court adopted a "nearby move" test whereby if the custodial parent's new location was not at least a certain threshold distance from the noncustodial parent, the court would not evoke the standard's second tier, a showing of exceptional circumstances.187 Likewise, the Fourth Department abandoned the three-tier test in Ideman v. Ideman.188 There the court awarded custody to the noncustodial father because the mother, in an unauthorized move, relocated their child.189 The court did not mention, nor did it cite to the three-tier test, and instead stated that "[t]he court may not make an initial determination of permanent custody without conducting a factual hearing to determine the fundamental issue of the best interests of the child."190

In Hemphill v. Hemphill,191 the Second Department attempted to remove one of the foundation blocks from New York relocation law by abandoning the presumption that a move which interfered with visitation was not in the best interests of the child.192 Instead of a presumption, the court promulgated a balancing test between the rights and problems of the child with the rights and problems of the parents.193 Despite the decision in Hemphill, subsequent case law relapsed back into the three-tier approach to relocation law194 until Tropea was decided in 1996.

189. See id. at 353.
190. Id.; see also Wodka v. Wodka, 565 N.Y.S.2d 353, 354 (App. Div. 1990) (holding that the unauthorized removal of a child was one factor to be considered in a best interests hearing to determine a change of custody).
192. See id. at 693-94 ("There is no basis for a per se rule, i.e., that inasmuch as relocation involves separation from a noncustodial parent which is, of itself, not in the child's best interest, relocation should be denied as a matter of law.").
193. See id.
B. The Tropea Decision

In the face of the New York courts' confusion in defining the applicable relocation standard, in 1996, the highest New York court restructured the state's approach to relocation in *Tropea v. Tropea*.\(^{195}\) In an attempt to fix what was wrong with the three-tier test, the court decided two difficult companion cases and affirmed appellate court decisions allowing the custodial parents to relocate with their children.

In *Tropea*, the custodial mother of two children sought permission to relocate from Onondaga County to Schenectady, New York.\(^{196}\) The mother planned to move into a home she purchased with her intended husband whose architecture business was located in Schenectady.\(^{197}\) In addition to the two children from her prior marriage to the noncustodial father, the custodial mother and her new husband were expecting a child of their own.\(^{198}\) In their divorce decree, the Tropea parents agreed not to relocate outside Onondaga County without court approval.\(^{199}\) Based upon this agreement, the noncustodial father sought a change of custody, claiming that the decision to move to Schenectady was merely the mother's choice of a different lifestyle and would essentially punish him by denying him frequent and continuous contact with his children.\(^{200}\) The noncustodial father presented evidence that he was an active participant in the lives of the two children, and that he was an active participant in the lives of his children.\(^{201}\)

Initially, the lower court denied the move and dismissed the petition for removal.\(^{202}\) However, on appeal, the intermediate appellate court reversed the Judicial Hearing Officer's decision and allowed the move.\(^{203}\) The appellate court held that the custodial mother established that the move would not infringe upon the noncustodial parent's right to meaningful access with his children.\(^{204}\) Moreover, the liberal visitation schedule proposed by the custodial parent and her willingness to ensure

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196. *See id.* at 146.
197. *See id.*
198. *See id.*
201. *See id.* at 147.
202. *See id.*
203. *See id.*
204. *See id.*
the maintenance of regular and frequent contact with the noncustodial father enabled the court to conclude that the move was in the best interests of the children.\textsuperscript{205}

In \textit{Browner v. Kenward},\textsuperscript{206} the companion case to \textit{Tropea}, the parents agreed that the custodial mother would need permission to move more than thirty-five miles away from the noncustodial father.\textsuperscript{207} The custodial mother sought permission to relocate with her son from White Plains, New York, to Pittsfield, Massachusetts, a distance of 130 miles.\textsuperscript{208} The mother presented evidence that although she searched in New York, she could not find a job or suitable housing.\textsuperscript{209} In Massachusetts, she located an affordable home and a good job and would also have the benefit of being close to her parents, to whom her son had become quite attached.\textsuperscript{210}

The court allowed the move even though the move to New England would interfere with the visitation rights of the noncustodial father, who had been "vigilant" in maintaining his relationship with his son, and even though the family court found the mother’s argument "to be less than convincing."\textsuperscript{211} The family court held that the 130-mile move, although greatly increasing the distance between the noncustodial parent and the child, "would not deprive respondent of meaningful contact with his son."\textsuperscript{212}

In its analysis of prior case law, the court of appeals in \textit{Tropea} began by noting that relocation cases involve a balancing between the interests of the custodial parent in moving, the interests of the noncustodial parent in maintaining a relationship with her child, and the interests of the child.\textsuperscript{213} After describing the current relocation standard, a product of the appellate court’s interpretation of \textit{Weiss v. Weiss}\textsuperscript{214} and \textit{Daghir v. Daghir},\textsuperscript{215} as “problematic” and “unsatisfactory,” the court
went on to note that a three-tier test is difficult to apply and "erects artificial barriers to the courts' consideration of all of the relevant factors."\(^{216}\)

In abandoning the previous three-tier test, the court stated that relocation cases "are simply too complex to be satisfactorily handled within any mechanical, tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances."\(^{217}\) The court then adopted the best interests of the child standard as a means of deciding relocation cases on a case-by-case basis.\(^{218}\) In short, the court condensed the previous standard into the catchall third tier to allow greater judicial discretion, stating that "no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome."\(^{219}\)

The court rejected what was one of the most restrictive standards in relocation law in order to embrace a more permissive approach. Arguments that were insufficient to justify interference with the noncustodial parent's visitation under the previous three-tier test, such as remarriage, wanting to make a fresh start and hoping for economic betterment—may now be valid motives if the move would ultimately be in the best interests of the child.\(^{220}\) In addition, the court stated that the noncustodial parent's ability to relocate should be considered along with the custodial parent's desire to move.\(^{221}\) The court provided little guidance with respect to what factors would be considered in determining the best interests of the child. The court included motives, quality of life, right to visitation, economic benefit, educational benefit, and the overall preservation of the parent-child relationship, but left the list open to include other factors at the judge's discretion.\(^{222}\)

The *Tropea* decision broke fourteen years of silence from the New York Court of Appeals. However, while the three-tier test may have been problematic and unsatisfactory, the best interests standard fails to solve any of the previous problems. Indeed, the best interests of the child standard actually creates additional ones.

\(^{216}\) *Tropea*, 665 N.E.2d at 149-50 (including factors such as motives and the positive or negative impact that the change would have on the child).
\(^{217}\) Id. at 150.
\(^{218}\) See id.
\(^{219}\) Id.
\(^{220}\) See id. at 150-51.
\(^{221}\) See id.
\(^{222}\) See id. at 151.
IV. APPLICATION OF THE BEST INTERESTS OF THE CHILD STANDARD IN RELOCATION CASES

Most commentators agree that there were problems under the three-tier test.\(^{223}\) For one, it favored the noncustodial parent through both a presumption and a heavy burden of proof on the custodial parent. However, *Tropea* does not fix these problems. Besides making it very difficult for the custodial parent to relocate, the *Tropea* court failed to provide desperately needed guidance to parents and litigators seeking to resolve relocation disputes.

A. Litigation Problems

While the best interests of the child standard is generally used in custody determinations, it is inappropriate for relocation cases. For the purposes of determining where, and with whom, the child should reside, the best interests standard is too vague to provide a useful guideline.\(^{224}\) The change to the best interests standard fails to resolve litigation problems that existed under the previous three-tier test, including the lack of definitions, the rising number of cases, and the increasing complexity of relocation disputes in general.

Prior to *Tropea*, the appellate courts struggled to define the various levels of the three-tier test. Specifically, defining “meaningful access” and “exceptional circumstances” generated a wealth of case law, but no uniform definition.\(^{225}\) Meaningful access has been defined as the “ability of a noncustodial parent to continue to maintain a close and meaningful relationship with his or her children.”\(^{226}\) It has also been defined as “frequent and regular”\(^{227}\) access. Under the first definition, the noncustodial parent and child need not be physically close to one another. In contrast, under the second definition, the parent and child need to be physically close to maintain frequency of contact. Exceptional circumstances could include economic necessity, remarriage, a new job,
or any number of other factors depending upon the judge’s frame of mind. In addition, factors which may have been considered significant in one case could be easily dismissed in another court under the guise of needing case-by-case analysis. The result was a standard that provided families and litigators with little insight and even less security in seeking the resolution of a relocation petition.

Some commentators question whether it is possible to define the best interests of the child. Today, although every jurisdiction, at least as a matter of policy, if not expressly, decides custody disputes according to the best interests of the child standard, the definition can change from state to state, court to court, and even from judge to judge. Different courts ask different questions, which may include, who is the primary caretaker?, what is the chance of a reasonable visitation schedule?, and where would the child prefer to live?. In the past, courts have relied on at least thirty-two different factors to determine best interests. In the light of the appellate court’s inability to agree on definitions encompassed in the three-tier test, including the overall lack of a consensus as to what the “best interests of a child” test entails, there is no reason to believe that the appellate courts will achieve better success in hammering out a definition of the “new” best interests of the child standard. In fact, since the Tropea decision came down, the appellate courts have been unsuccessful in defining the standard. Courts have included a variety of factors within the definition of best interests including the quality of affections shown to the child, parental fitness, the stability of the home, intellectual development, moral development, financial status, the wishes of the children, visitation rights, overall stability in the child’s life,

228. See supra notes 173-85 and accompanying text.
229. See Barron, supra note 172, at 419 n.38.
230. See Bowermaster, supra note 4, at 794.
234. See Clark, 645 N.Y.S.2d at 161; De Fazio, 640 N.Y.S.2d at 706.
235. See De Fazio, 640 N.Y.S.2d at 706.
236. See id.
237. See id.
238. See id.
239. See id.
quality of the home environment,\textsuperscript{241} competence of parental guidance,\textsuperscript{242} and health related concerns.\textsuperscript{243} Recently, in \textit{Stearns v. Baxter},\textsuperscript{244} the trial court included the following considerations in the determination of best interests: the child’s extended family relationships, the custodial mother’s job prospects, the child’s academic achievement, emotional and psychological upheaval, expense of travel, and the child’s contact with both parents.\textsuperscript{245} Clearly, neither the lower nor the appellate courts are any closer to understanding best interests than they were to defining the previous three-tier standard.

The vague nature of the best interests test was one of the primary reasons that the Tennessee Supreme Court rejected the standard in \textit{Aaby v. Strange}.\textsuperscript{246} As opposed to clearing up ambiguous terminology, the best interests standard only complicated the problem and failed to make the resolution of relocation conflicts easier. The Tennessee court enumerated two general goals in rethinking its approach to relocation disputes: first, favoring family autonomy over judicial intervention and second, easing the complexity of resolving relocation disputes.\textsuperscript{247} In abandoning their use of the best interests test, the court stated that the standard made the achievement of these goals difficult, if not impossible.\textsuperscript{248}

The standard, as applied in New York, has proven to be equally vague and amorphous. New York’s change to the best interests standard fails to decrease the number of custody problems litigated because now parents have a reason to litigate the custody issue right from the beginning. For example, even if the noncustodial parent concedes that the best interests of the child are with the other parent, he or she may decide to litigate the custody issue in the hopes of getting the court to take judicial notice that it is within the best interests of a particular child to have frequent contact with the noncustodial parent. Judicial notice could then be used to prevent the custodial parent from relocating with the child because trial courts are generally in the best position to determine the facts of the case, and appellate courts are usually reluctant to interfere

\begin{thebibliography}{99}
\bibitem{242} See id.
\bibitem{244} 655 N.Y.S.2d 261, 261 (Fam. Ct. 1997).
\bibitem{245} See id. at 262-63.
\bibitem{246} 924 S.W.2d 623 (Tenn. 1996). For a discussion of Tennessee relocation law, see \textit{supra} notes 105-14 and accompanying text.
\bibitem{247} See \textit{Aaby}, 924 S.W.2d at 629.
\bibitem{248} See id.
\end{thebibliography}
with the factual determination of the child's best interests. In situations where the custody of the children was already determined, either through an agreement between the parties or with the aid of the court, the best interests standard now gives the noncustodial parent a reason to re-initiate a full blown custody battle. "[I]n deciding whether to permit a move by a custodial parent most courts adopt essentially the same role as a court making an initial custody determination; that is, the court rules in favor of the option that it judges to be 'in the best interests of the child.'" In short, by examining the relocation problem under the best interests of the child standard, the court is doing twice the work. The issue of custody was already resolved under the same standard that the court will apply to relocation. Therefore, the change to the best interests standard offers the noncustodial parent a vehicle by which to re-argue an unfavorable custody decision.

Custody is given to a parent and not to a location. Therefore, any examination other than whether or not the move would cause harm to the child should not be applicable to a relocation case. The custodial parent should be able to rely on their award of custody without fearing that their decision to relocate will result in a reevaluation of her abilities as the custodial parent.

The relitigation of custody increases the risk of turning what might have been an amicable custody settlement into a nasty custody battle. The best interests standard may now deter, as well as undermine, custody agreements. One commentator noted that, as a practical matter, there are only two ways in which to win such a custody battle: showing that the custodial parent is more fit or showing that the noncustodial parent is less fit. It is certainly not in the best interests of children to expose them to repeated litigation of the fitness of their parents.

The application of the best interests standard in relocation also increases the complexity of the litigation. The standard asks the judge to predict what will be best for a child in the future. This assumes a certain level of judicial capability in being able to predict the future for a child he does not know, in a family which is itself just getting started. In

252. See id. (stating that such a contest "only increase[s] the acrimony between the divorcing parents").
addition, in cases where the custody of the child has already been determined, the best interests standard for relocation assumes that the judge deciding the relocation dispute is better equipped to determine the interests of the child than the parents or the judge who decided the original order.

In initial custody determinations, the best interests of the child standard often calls for expert testimony. When the issue changes from custody to relocation, the judge’s ability to determine best interests is still lacking. Consequently, the standard cries out for the use of psychologists and psychiatrists to evaluate the families and the situations in order for the court to intelligently identify what is best for the child. At a time where the income of the family may already be divided by alimony and child support, and where the parents now face the expense of supporting two residences, the increased expenditures are unjustified and contrary to the best interests of the child.253

The use of such medical and scientific personnel will add not only to the cost of the litigation but also to the length of the proceedings. Often in relocation disputes, the custodial parent has made some initial contact with the new location. The parent may have found a new house, leased an apartment, or been offered a new job or promotion. Such attachments to the new location are often sensitive to time, requiring parents to act quickly in order to secure their new apartment or house or to accept their new job. The noncustodial parent gains an advantageous position in delaying the custodial parent’s ability to move by increasing the complexity of the relocation dispute’s resolution. In the event that the court does allow the move, the noncustodial parent may have already succeeded in preventing the move by eliminating opportunities that existed in the new location.

B. The Burden of Proof

The allocation of the burden of proof in relocation law can often determine who will ultimately win the case.254 Courts and legislatures can silently place the burden of proof on a disfavored party by allocating a light burden onto the favored party. Theoretically, jurisdictions following a best interests of the child standard should be neutral. However, neutrality is the holy grail of relocation law. Neutrality, defined

253. See Handschu, supra note 249, at 4 (noting that the increased time and expense of expert opinions may not result in any greater insight into the resolution of the child’s best interest).
254. See Bowermaster, supra note 4, at 803.
as looking only to the interests of the child, independent of either parent, although always sought, is unobtainable in practice. Because the child’s best interests are fundamentally related to the interests of her custodial parent, it is impossible to consider the interests of the child without a consideration of the custodial parent’s.

In the pre-*Tropea* cases, the initial burden fell on the noncustodial parent to show that the move interfered with the parent’s visitation rights. This proved to be a light burden because any move that is far enough away to instigate a petition, or motion to enjoin it, will more than likely have a negative effect on the current visitation schedule. Once the noncustodial parent met this burden, the custodial parent faced the difficult challenge of rebutting the presumption that the move was against the best interests of the child. In a system that struggled to define its standard, the custodial parent often found it difficult to meet the requisite exceptional circumstances test.

Like the three-tier test, the best interests standard actually favors the noncustodial parent. Whereas prior to *Tropea*, a custodial parent seeking to move faced a difficult burden of showing exceptional circumstances, now under the best interests standard, a relocating parent may face a full blown custody battle. This is not to say that gaining initial custody of the child would not be a major consideration in future custody decisions, but rather, that upon deciding to relocate, the custodial parent faces a full custody determination for at least the second time. In this regard, the burden significantly increased from what it was under the three-tier test. Now the parent faces an investigation into motives, potential for improving quality of life, infringement on visitation, health related concerns, economic benefit, educational benefit, and general preservation of the parent-child relationship, in addition to whatever the particular judge deciding the case determines to fall within the meaning of best interests. In sum, the floodgates have been opened by the best interests standard.

In New York, the courts should issue a presumption in favor of the custodial parent’s right to move; the burden would fall upon the noncustodial parent to show that either the custodial parent’s motive in moving was not in good faith or that the move would somehow cause harm to the child. Moreover, the court should allocate the burden of

255. See *supra* note 173 and accompanying text.
256. See *supra* notes 175-85 and accompanying text.
proof while keeping in mind that a relocation decision is not a custody determination. Custody, as per the child’s best interests, was already determined. A change in custody should not be triggered by a decision that is within the prerogative of the custodial parent. A presumption in favor of the custodial parent’s right to relocate would recognize that, under some circumstances, a relocation may merit a change in custody, but only if based upon a showing of harm to the child and not upon the relocation.  

V. CONCLUSION

The New York Court of Appeals decision in Tropea v. Tropea, which abandoned the three-tier exceptional circumstances test in favor of the best interests of the child test, fails to solve the problems of the old standard and at the same time creates new ones. The court should adopt a presumption in favor of the custodial parent’s right to move, rebuttable upon a showing by the noncustodial parent that the move would be harmful to the child.

Given the inadequacy of judicial determinations as to the best interests of the child, and given that one of the few guidelines we have is the fact that continuity and stability in relationships are important for the child, courts should be restricted in their authority to interfere with post-divorce family-unit decision-making. Decisions concerning the welfare of the child should be left to the custodial parent who, by virtue of his or her relationship with the child, is best-equipped to determine the child’s needs. The custodial parent should be permitted to decide where he or she and the child will reside, and that decision should be second-guessed only where it would present a “clear danger to the child’s well-being.”

A jurisdiction that recognizes a presumption in favor of the right to relocate will avoid problems with litigation; there will be a reduction of cases, a simplification of the issues, and an overall confidence in knowing how the court will approach the problem.

Presumptions in favor of the right to move allocate the burden of

259. For example, the Florida court in Russenberger v. Russenberger, 654 So. 2d 207, 214 (Fla. Dist. Ct. App. 1995), stated that while it was not a per se rule in favor of relocation, the noncustodial parent should carry the burden of showing that the move is not in the child’s best interests.


proof so that both custodial and noncustodial parents are aware of their burdens. In contrast, the best interests analysis leaves the custodial parent in the dark as to which factors the court will deem important enough to permit relocation. Moreover, under other relocation tests, it is often unclear as to who has the burden to prove these various factors. The presumption makes it clear that the custodial parent must first show that there is a good faith motive, and then the noncustodial parent can rebut this presumption by showing that the move would harm the child.

Finally, a presumption in favor of the right to relocate protects the various rights of both parents from the chilling effect of unrestrained judicial discretion. As the Florida court stated in Costa v. Costa,262 "[w]ho but the wisest among us, except in the clearest of cases, could divine what may be in the best interests of the children?"263 Determining the child’s best interests should be left to the party in the best position to protect it: the custodial parent. This would also protect the rights of the parent by favoring the custodial parent-child relationship and eliminating the likelihood of forcing the parent to choose between a move and custody.

Perhaps it was too great a leap to expect the New York court to move from a presumption against the custodial parent to a presumption in her favor. However, the court should now establish a presumption in favor of the right to relocate in order to manifest New York’s commitment to “strengthening and stabilizing the new, post-divorce family unit . . . minimizing the parents’ discomfort and maximizing the child’s prospects of a stable, comfortable and happy life.”264

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263. Id. at 1255.
264. Tropea, 665 N.E.2d at 151.